NO. 99032-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEP'T OF LABOR & INDUS.,

Petitioner,

v.

TRADESMEN INT'L, LLC,

Respondent.

DEP'T OF LABOR & INDUS.,

Petitioner,

v.

LABORWORKS INDUS. STAFFING SPECIALISTS, INC.,

Respondent.

BRIEF OF AMICI CURIAE WASHINGTON STATE LABOR COUNCIL, AFL-CIO & WASHINGTON STATE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO

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APPENDIX

I. IDENTITY AND INTEREST OF AMICI CURIAE

The Washington State Labor Council, AFL-CIO, represents approximately 500,000 Washington workers across approximately 600 local unions and trade councils, and the Washington State Building & Construction Trades Council, AFL-CIO, represents unions and workers in the building and construction trades. Together, the Councils have an interest in protecting the health and safety of workers and ensuring that working environments are safe for the workers of Washington, especially through the Washington Industrial Safety & Health Act (WISHA). "Labor unions, specifically the Washington chapter of the AFL-CIO, were instrumental in gathering support for Washington to become an OSH Act state plan state. The unions' feeling was that they could have more input in the creation of state, rather than federal, worker protection policies, and would be provided better access to compliance services under state control." Mark O. Brown, *A Discussion of the Washington Industrial Safety and Health Act of 1973, Presented as: A Preface to the University of Puget Sound Law Review*, 17 U.P.S. L. Rev. 245 (1994).

The Councils respectfully suggest this Court should clarify the proper application of the economic realities test in light of the liberal mandate and remedial nature of WISHA, considering the broad statutory definition of "employer" found in that Act and overturn the Court of

Appeals' decisions in *Dep't of Labor & Indus. v. Tradesmen International, LLC*, 14 Wn.App.2d 168, 470 P.3d 519 (2020), and *Dep't of Labor & Indus. v. LaborWorks Industrial Staffing Specialists, Inc.*, No. 79717-4, slip op. (2020).

II. INTRODUCTION AND STATEMENT OF THE CASE

These cases involve the relationship between work site employers, temporary staffing agencies ("temp agencies") and temporary workers, and whether both work site employers and temp agencies are responsible for the health and safety of temporary workers, a uniquely vulnerable employee population.

The population of temporary workers, as opposed to permanent employees, has been growing rapidly in Washington State since 1990, especially in hazardous occupations and the construction trades. Michael Foley, *Factors Underlying Observed Injury Rate Difference between Temporary Workers and Permanent Peers*, 60 Am. J. Ind. Med. 841 (2017). Studies show that Washington workers' compensation claims involving temporary total disability (time-loss), which reflect injuries serious enough to temporarily prevent a worker from returning to any work, were higher for temporary workers. *Id.* At the same time that temporary worker populations are growing, and these workers are facing higher injury rates, blue-collar temporary workers are more likely

to be African-American and Latinx workers.[1] Dave DeSario & Jannelle White, *Race, To the Bottom: The Demographics of Blue-Collar Temporary Staffing*, Temp Worker Union Alliance Project (2020). Temporary workers are paid less, are less likely to receive benefits and are more likely to be injured on the job than their permanent worker peers. *Id.* Considering that temporary workers are more likely to be African-American or Latinx than the overall working population, the decreased safety and increased risk of serious injury inherent to temporary work disproportionately affects non-white workers. *Id.* Policies are needed to improve screening and training of temporary workers, discourage job-switching, improve hazard awareness, and protect workers' rights to refuse unsafe working conditions. Michael Foley, *Sharp Safety & Health Assessment & Research for Prevention: Temporary Workers at Risk* (2017), Appendix at 18.

Both temp agencies and work site or host employers should be held responsible for temporary worker safety. In both *Dep't of Labor & Indus. v. Tradesmen International, LLC,* 14 Wn.App.2d 168, 470 P.3d 519 (2020), and *Dep't of Labor & Indus. v. LaborWorks Industrial Staffing Specialists, Inc.*, No. 79717-4, slip op. (2020), the consolidated cases before this Court, temp agency employers were cited, along with

[1] The appellatives used reflect the terminology used by the Temp Worker Union Alliance Project (TWUAP) and do not reflect any position of the Amici regarding demographic nomenclature. This publication is included in the Appendix.

work site employers, for WISHA violations affecting the health and safety of their shared, temporary worker employees.[2] Both Tradesmen and LaborWorks maintained real, economic control over their employees, with the exception of actual, physical day-to-day control of the work sites involved, although these temp agencies had control over the work site by agreement with work site employers.

In this case, by contract with the work site employer, Tradesmen reserved the right to terminate its agreement with the work site employer and withdraw its employees from the work site at any time, for any reason. *See* Certified Appeal Board Record, Citation & Notice No. 317940588, at 754. Tradesmen had "exclusive responsibility" for the payment of its employees' wages. *Id.* Tradesmen itself determined the fair wages and benefits to be provided to the employees and itself paid those wages. *Id.* Tradesmen itself selected the employees and issued a contractual "guarantee" that the employees sent to the work site would be "of the quality and have the knowledge" requested by the work site employer. *Id.* Tradesmen's employees were the exclusive asset of the temp agency, and by contract, work site employers agreed not to compete with Tradesmen by recruiting or hiring Tradesmen's temporary workers during the contract term. *Id.* Tradesmen also had the right to

[2] This Statement of the Case is brief and focused on particular facts in recognition of the extensive briefing of the parties and for the efficiency of the Court.

immediately discontinue the provision of its employees to the work site employer and to "prohibit" its employees from working for the work site employer if that employer was late in paying Tradesmen. *Id.* Tradesmen's employees could not be required to operate vehicles away from the work site without written permission from Tradesmen. *Id.* By contract, work site employers were required to inform Tradesmen of any safety violations, Tradesmen had the right to conduct onsite safety investigations (which work site employers were required to cooperate with as specified in the contract) and Tradesmen required work site employers to provide general liability insurance coverage of a million dollars per occurrence to protect Tradesmen. *Id.* Tradesmen bargained for and work site employers agreed to defend, indemnify, and hold Tradesmen harmless from any losses or lawsuits arising from wrongful or negligent acts committed by the work site employer or by Tradesmen's own employees, including violations of federal and state laws (like OSHA and WISHA). *Id.* LaborWorks' contract with its work site employers, although not identical in terminology, contains similar terms. *See* Certified Appeal Board Record, Citation & Notice No. 317941657, at 505-507. The economic reality, per the contracts used by temp agencies like the Respondents, is that temp agencies have control over temporary employees, work site employers and work sites, without any need for physical control of the work site.

Nonetheless, in applying the economic realities test, a federal OSHA standard adopted by the Board of Industrial Insurance Appeals (BIIA) in 1997, these temp agencies were exempted from responsibility for the safety of their employees.

III. STATEMENT OF THE ISSUE

Do the Court of Appeals' decisions in *Dep't of Labor & Indus. v. Tradesmen International, LLC,* 14 Wn.App.2d 168, 470 P.3d 519 (2020), and *Dep't of Labor & Indus. v. LaborWorks Industrial Staffing Specialists, Inc.*, No. 79717-4, slip op. (2020), comport with the plain language, remedial purpose and liberal mandate of Chapter 49.17 RCW, the Washington Industrial Safety & Health Act?

IV. STANDARD OF REVIEW

Where, as here, the issue before the Court addresses statutory interpretation, a matter of law, the standard of review of this Court is *de novo. Afoa v. Port of Seattle*, 191 Wn.2d 110, 118, 421 P.3d 903 (2018).

V. ARGUMENT

Washington's Industrial Safety & Health Act (WISHA), Chapter 49.17 RCW, created by the Washington State Legislature in the exercise of its police power and to fulfill its constitutional mandate to protect employees under Article II, § 35 of the Washington State Constitution, declares its purpose "to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall

equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970." RCW 49.17.010. Standards adopted under WISHA "can be more protective, although not less, of worker safety than rules promulgated under the OSH Act." *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 424, 980 P.2d 701 (1999). WISHA supplements the federal OSHA laws, and often is more expansive and protective in its reach. For example, WISHA rules are more protective than OSHA rules in such areas as regulation of bloodborne pathogens, hazard communication, permissible exposure limits and respiratory protection for air contaminants, personal protective equipment (PPE) and penalties for WISHA violations. *See* 29 C.F.R. 1910.1030 & WAC 296-823 (bloodborne pathogens); WAC 296-901-140 (hazard communication); and Chapter 296-842 WAC (respirators). *See also* Brown[3], *supra.*

WISHA was created "in the public interest for the welfare of the people of the State of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the State of Washington...". RCW 49.17.010. "The purpose of WISHA is to assure, insofar as may be reasonably possible, safe and healthful working conditions for every person working in the State of Washington." *Potelco, Inc. v. Dep't of*

[3] Mark O. Brown was the Director of the Washington State Department of Labor & Industries in 1994.

Labor & Indus., 191 Wn.App. 9, 21, 361 P.3d 767 (2015), citing RCW 49.17.010. WISHA is a remedial statute, and its regulations are to be liberally construed to carry out its purpose of ensuring safe and healthful working conditions. *Elder Demolition Ind. v. Dep't of Labor & Indus.*, 149 Wn.App. 799, 806, 207 P.3d 453 (2009).

Given the remedial nature of the statute, the definition of "employer" found in WISHA is to be construed liberally. RCW 49.17.020(4) provides that an "employer" under WISHA is "**any** person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in **any** business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons..." (Emphasis added). An "employee" is "an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise...". RCW 49.17.020(5).

When this Court previously considered the definition of "employer" and "employee" under RCW 49.17.020, the Court construed those definitions broadly:

> In addition, the express language of WISHA undermines the Port's argument. Subsection (2) imposed the specific duty on 'employers,' which is defined broadly. *See* RCW 49.17.020(4). The Port easily falls within this definition. Likewise, Afoa easily falls within the definition of an

> 'employee.' *See* RCW 49.17.020(5). Thus, even if Afoa is not the Port's employee, the Port is an "employer" and Afoa is an 'employee' under the statute. That is all WISHA requires for a specific duty to arise. *See* RCW 49.17.060(2).

Afoa, 176 Wn.2d at 473 (the specific duty under RCW 49.17.060(2) requires employers to comply with WISHA regulations and runs to any worker who may be harmed by the employer's violation of a safety rule, irrespective of any employer-employee relationship).

Nonetheless, when the Board of Industrial Insurance Appeals (BIIA) adopted the "economic realities test" in 1997, the BIIA did not liberally construe the statute to increase worker safety. *In re Skills Resource Training Ctr.*, BIIA Dec., 95 W253 (1997). Instead, the BIIA relied on the lack of Washington appellate caselaw at the time interpreting the definition of "employer" in WISHA and defaulted to an Occupational Safety and Health Review Commission (OSHRC) version of the economic realities test as an equivalent OSHA standard. *Id.* at 7.

The OSHRC, the adjudicative body charged with hearing appeals of citations issued by the Secretary of Labor for violations of OSHA, had adopted its own version of a seven-factor test that it called the "economic realities test" by 1978, focusing heavily on control of the work site. *Secretary of Labor v. Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702 (1978); *In re Skills Resource Training Ctr.* at 7.

After 1992, however, the OSHRC began applying a multifactor economic realities test from *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344 (1992) to determine who qualified as an employer under OSHA, and recently clarified that this is the test to be applied, not the economic realities test. "Since the Supreme Court issued *Darden*, 503 U.S. 318, in 1992, the Commission has consistently applied the common law agency doctrine set forth in that decision to employment relationship question arising under the OSH Act instead of the economic realities test...". *Secretary of Labor v. FreightCar America, Inc.*, OSHRC Docket No. 18-0970 (March 3, 2021) at 3.

The *Darden* multifactor test echoes *Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547 (1947) and cases arising under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and the Social Security Act, 42 U.S.C. § 301 et seq. *See United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463 (1947). In these cases, the United States Supreme Court stated that while "right to control how 'work shall be done'" is a factor in the determination of whether a worker is an employee, it is not the controlling factor. *Id.* at 715-716. The Court will consider economic reality, which is made up of many factors, where "No one is controlling, nor is the list complete." *Id.* The other factors to be considered include those discussed by this Court in

Anfinson v. FedEx, 174 Wn.2d 851, 281 P.3d 289 (2012).[4]

In contrast to the BIIA's economic realties test, the *Darden* or *Bartels* test provides that "[s]ince the multifactor common law test here adopted, *see e.g., id.* at 751,752, contains no shorthand formula for determining who is an 'employee,' all of the incidents of the employment relationship must be assessed and weighed, with no one factor being decisive." *Darden*, 503 U.S. at 319; *see also FM Home Improvement, Inc.*, 22 BNA OSHC 1531 (No. 08-0452, 2009)(ALJ) at 1538 ("There is no shorthand formula for determining who is an 'employee' under the Act, *Darden*, or common law. All incidents of the employment relationship must be assessed and weighed with no one factor being decisive.").

Unlike the OSHRC, which adapted its approach to account for changes in the law, the BIIA never adopted the new multifactor economic realities test, and **a course-correction is necessary here**. The "key question" in determining who qualifies as an employer under WISHA should no longer be who controls the work site, particularly when the economic reality at issue is the economic reality of temporary workers. *In re Skills Resource Training Ctr.*, BIIA Dec., 95 W253 (1997), p. 7. In fact, most of the OSHRC cases relied upon by the BIIA in adopting the OSHRC's early version of the economic realities test dealt with

[4] The Eight Circuit has approved a hybrid test which combines the common-law control and economic realties tests, although Amici do not advocate for adoption of this approach. *Alexander v. Avera St. Luke's Hospital*, 768 F.3d 756 (2014).

subcontractor (independent contractor) relationships, not the temp agency business model at issue here. *See Secretary of Labor v. Union Drilling*, 16 OSHC 1741 (1994); *Secretary of Labor v. Vergona Crane*, 15 OSHC 1782 (1992); *MLB Industries. Inc.*, 12 BNA OSHC 1525 (1985). In *Union Drilling*, drilling company CNG contracted with another company, Union Drilling, to temporarily hire two Union Drilling work crews when CNG was short of manpower. In *MLB Industries*, general contractor Crown Zellerbach hired laborers of subcontractor MLB Industries on an emergency basis for concrete removal at another work site, located at a distance from the construction project location where Crown Zellerbach and MLB had been working together on a warehouse project. *MLB Industries. Inc.* at 1529. In *Vergona Crane*, a construction company subcontracted with a crane company to lease a crane and crane operators.

These employment relationships, if the subject of WISHA violations occurring in Washington today, would be analyzed under the framework outlined by this Court for analysis of WISHA violations in multiemployer work environments, which allows a determination based on contractual control or the right to control the work environment and does not require day-to-day supervisory control, as opposed to the OSHRC's early version of the economic realities test adopted by the BIIA. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013)(Jobsite owners have a specific duty to comply with WISHA regulations if they retain control

over the manner and instrumentalities of work being done on a work site; this duty extends to all workers on the work site that may be harmed by a WISHA violation); see also *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985) & *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990)(Subsection 2 of RCW 49.17.060 creates a specific duty for employers to comply with WISHA regulations which run to any employee on a work site who may be harmed by the employer's violation of the safety rules).

Secretary of Labor v. Manpower Temporary Services, Inc., 5 BNA OSHC 1803 (1977) was the only case cited by the BIIA that actually involved a temp agency acting as a temp agency and not merely as an HR Department in a lease-back scheme as in *Secretary of Labor v. Murphey Enterprises, dba Murphy Brothers Exposition*, 17 OSHC 1477 (1995). And in *Manpower Temporary Services*, in the context of a worker killed in a fall through a poorly lit hatch while cleaning debris in a ship's hold in Tampa Bay, Florida, the Administrative Law Judge (ALJ) based his interpretation of the economic realities test entirely on control of the work site and on his stated opinion that it would be too burdensome for a temp agency to have to satisfy any safety requirements or take any steps to ensure compliance with applicable safety and health standards. Some may have viewed this as an acceptable perspective regarding workers referred to as "casual laborers" in 1977, but it is not an acceptable perspective,

particularly considering the disproportionate impact of injury rates on temporary workers in Washington's black and Latinx communities. If a temp agency can protect itself by inserting indemnification clauses into its contracts with work site employers, as in this case, it can certainly take steps to protect its employees, to whom it owes a duty to furnish "a place of employment free from recognized hazards that are causing or likely to cause serious injury or death...". RCW 49.17.060(1). This is the general duty of every employer to protect the employer's own employees, *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990), and temp agencies will not act in furtherance of either their general or specific duties to preserve the safety of their employees if temp agencies are exempt from WISHA liability as soon as workers leave the premises of the temp agency and enter a work site controlled by another entity.

The OSHRC's early version of the economic realities test, as interpreted by the BIIA and the Court of Appeals in these consolidated cases, is too heavily weighted to rely on physical control of the work site, which exempts temp companies from responsibility for WISHA violations in most cases, when the contracts used by temp agencies like the Respondents show these companies can and do contract for control over workers, work site employers and work sites. This does not serve the purpose for which WISHA was created or the remedial goal of ensuring safety. It also does not serve the public interest or the public policies

underlying WISHA, of ensuring workplace safety and protecting workers. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 528, 259 P.3d 244 (2011)("For purposes of this certification, Cudney and ALSCO agree that WISHA and its accompanying regulations establish a clear public policy of ensuring worker safety and protecting workers who report safety violations from retaliation.").

This Court is not bound by the BIIA's interpretation of the economic realities test or by OSHRC's use of a similar test and would not be bound to adhere to the test even if the Supreme Court of the United States has adopted it. "It is well settled that the Supreme Court's construction of a similarly worded federal statute, although often persuasive, 'is not controlling in our interpretation of a state statute.'" *Hoffer v. State*, 113 Wn.2d 148, 151, 776 P.2d 963 (1989)(quoting *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227, 39 A.L.R.4th 975 (1984)) (additional citations omitted). This Court has stated, "...we may find guidance in federal cases interpreting the mirror image OSHA provisions, although plainly we are not bound by such cases." *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 144 P.3d 1160 (2006).

While it makes perfect sense to hold the employer who controls the work site responsible for WISHA violations as the entity best situated to prevent injuries and preserve safety, it also makes sense, considering the economic realities of temporary workers today, to hold both work site

employers and temp agencies responsible for safety. Placing physical day-to-day control of the work site over every other factor that determines who qualifies as an employer under WISHA undermines this Court's holdings regarding the citation of multiple employers for WISHA violations when multiple employers have control over workers. Under WISHA, employers are responsible for the safety and health of their employees. RCW 49.17.060. It is well established that multiple employers can be cited for WISHA violations of workplace safety standards if this advances WISHA's safety objectives. *Potelco*, 191 Wn.App. at 30, citing *Afoa v. Port of Seattle*, 176 Wn.2d 460, 471-472, 296 P.3d 800 (2013).

In applying the economic realities test, however, the Court of Appeals has stated, and restated in these consolidated cases, based on the BIIA's emphasis on the control factor, that "the key question is whether the employer has the right to control the worker." *Potelco*, 191 Wn.App. at 31, citing *In re Skills Resource Training Center*, BIIA Dec., 95 W253 (1997). However, the BIIA should have weighed the economic realities factors equally, without weighing the right of control as the "key question." *Potelco*, 191 Wn.App. at 31. The BIIA also should have considered the economic realities in light of *Darden/Bartels.*

This interpretation harmonizes the economic realities test as applied in WISHA cases with this Court's application of the economic

realities test or economic-dependence test for determining employee status in cases under the Washington Minimum Wage Act (MWA), Chapter 49.46 RCW, which runs parallel to the federal Fair Labor Standards Act (FLSA), just as WISHA runs parallel to OSHA, although WISHA is broader and more protective in scope than its federal counterpart. *Anfinson v. FedEx*, 174 Wn.2d 851, 281 P.3d 289 (2012).

Given that the FLSA (along with the Social Security Act) is one of the sources of the *Darden/Bartels* version of the economic realities test applied by the OSHRC and the federal courts, it would be appropriate to apply the reasoning of *Anfinson* here, particularly given that the MWA, like WISHA, is a remedial statute. In *Anfinson*, this Court applied the well-settled principles of statutory interpretation when determining the correct legal standard for determining who qualifies as an "employee" and "employer" under the MWA and found those terms to be ambiguous. *Anfinson*, 174 Wn.2d at 866. Notably, the MWA defines an employee as "any individual employed by an employer," which is remarkably similar to the definition of employee under WISHA, which states an employee is "an employee of an employer who is employed in the business of his or her employer…". RCW 49.46.010(3) & RCW 49.17.020(5). An "employer" under the MWA is any individual or entity "acting directly or indirectly in the interest of an employer in relation to an employee," while an "employer" under WISHA is any individual or entity "which engages

in any business, industry, profession or activity in this state and employers one or more employees ...". RCW 49.46.010(4) & RCW 49.17.020(4). The definition found in the MWA was described as "a broad definition," but so too are the definitions of "employer" and "employee" found in WISHA. These definitions are certainly broad enough to encompass the employer-employee relationships between temporary workers and both their temp agency and work site employers. This was recognized by Division II of the Court of Appeals in the unpublished case of *Staffmark Investment, LLC v. Dep't of Labor & Indus.*, No. 52837-1, slip op. (2020), where the Court of Appeals did acknowledge the employer-employee relationship between temporary workers and their temp agency employers. "Given the legislature's expansive definitions of 'employer' and 'employee,' holding Staffmark liability as a joint employer on this record supports the legislature's directive to establish 'safe and healthful working conditions.' RCW 49.17.010, .020." *Id.* at 15.

Applying the same analytical framework that the Court applied in *Anfinson* to this case, considering the economic reality of temporary workers today, as well as the principles of liberal construction, the Court should not support any test for temporary workers which construes control of a temporary worker's work environment as the controlling factor in determining who constitutes an "employer" of a temporary worker under WISHA. Just as in *Anfinson*, "A liberal construction, therefore, is one that

favors classification as an employee." *Anfinson*, 174 Wn.2d at 869. "The economic-dependence test provides broader coverage than does the right-to-control test," and whatever test the Court adopts in this case, whether the *Darden/Bartels* test or another test, it should be a test that furthers the remedial purpose of WISHA and provides the greatest protections for temporary workers. *Id.*

"Safety legislation is to be liberally construed, and for good reason." *Herberg v. Swartz*, 89 Wn.3d 916, 578 P.2d 17 (1978), citing *Pacific Shrimp Co. v. United States Dep't of Transp.*, 375 F.Supp. 1036, 1043 (W.D.Wash.1974); *Lilly v. Grand Trunk W. R.R.*, 317 U.S. 481, 63 S.Ct. 347, 87 L.Ed. 411 (1943). "Safety legislation must be liberally construed, and courts should not be moved by considerations of convenience or practicability to whittle away and eventually nullify their protection." *Id.*, citing *United States v. Atchison T.S.F. Ry.*, 156 F.2d 457 (9th Cir., 1946). As a remedial statute, WISHA and its regulations are liberally construed to carry out its purpose. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988). "[R]egulations promulgated pursuant to WISHA ... must also be construed in light of WISHA's stated purpose." *Adkins*, 110 Wn.2d at 146, 750 P.2d 1257.

If the BIIA had not weighed control of the work site as the most important factor in recognizing an "employer" under WISHA, the Department of Labor and Industries' citation of both the temp agencies

and the job site employers would have been upheld. Tradesman and LaborWorks did share substantial control over the workers and the work site with the actual work site employers and were protected by their contracts, which they used to control the temporary workers, the work site employers and in many ways, the work site. **The fact that temp agencies often do not choose to exercise the control they factually possess is an indicator of the endemic problem facing temporary workers—their employers could protect them but do not always choose to do so.** Just as the policy rationale for holding general contractors responsible for workplace safety in *Stute*, 114 Wn.2d at 463, was that the general contractor is in the best position to ensure compliance with safety regulations, the policy rationale for placing shared responsibility for worksite safety on both work site employers and temp agencies is similar—temp agencies have an employer-employee relationship with temporary workers, as well as power and authority over work site employers that they bargain for and memorialize in contracts, which place them in a position to ensure compliance with safety regulations and protect their temporary worker employees. Thus, this Court should reject the BIIA's standard which focuses on direct, physical control of the work site, and adopt a standard for temporary workers which considers all aspects of the employer-employee relationship, like the *Darden/Bartels* test, which in addition to the location of the work and control of the work

site, also considers factors like how the individual's work fits into the business model of the alleged employer, the length of the relationship between the employee and employer and the control of the employer over the contract terms.

VI. CONCLUSION

As Director Mark O. Brown of the Department of Labor and Industries wrote in 1994, barely twenty years after the enactment of WISHA:

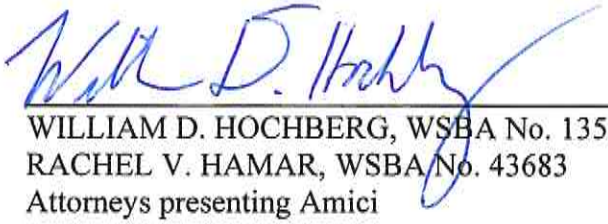
> The economic cost of worker injury is high: Labor and Industries pays approximately $1 billion each year to compensate workers for lost wages and medical benefits. This does not account for the financial loss from lost productivity to our economy and the loss to our tax base. **Nor does it tell of the personal, emotional cost to an injured worker when a moment of misfortune denies him or her a lifetime of livelihood.** I offer these statistics to express the formidable mission facing the people who administer WISHA and to indicate the Act's importance in protecting workers. Without the Act, the numbers of injured and killed would be far higher. I also want to emphasize that Washington workers are laboring in some of the most hazardous industries in the country, including forestry, construction, agriculture, mining, fishing and heavy manufacturing. **The prevalence of high-hazard occupations underscores the need for maximum accountability for employers and workers in the interest of on-the-job safety and health**, and provides incentive for government, management, and labor to cooperate toward achieving a safe work environment.

Brown, *supra* (Emphasis added). Knowing, as we do now, that temporary workers are taking an increasing role in these hazardous industries, and that these workers represent a disproportionate number of

black and Latinx workers, the importance of maximum accountability under WISHA is greater now than ever before.

Accordingly, the Amici Washington State Labor Council, AFL-CIO, and Washington State Building and Construction Trades Council, AFL-CIO, respectfully suggest this Court should clarify the application of the economic realities test in light of the liberal mandate and remedial nature of WISHA, considering the broad statutory definition of "employer" found in that Act, and reverse the Court of Appeals' decisions in *Dep't of Labor & Indus. v. Tradesmen International, LLC,* and *Dep't of Labor & Indus. v. LaborWorks Industrial Staffing Specialists, Inc.* while rejecting the BIIA's standard from *In re Skills Resource Training Center* and remanding the cases to the BIIA for additional fact finding consistent with this Court's decision. Temp agencies exert substantial control over temporary workers, work site employers and work sites, and should be held accountable under WISHA for the safety of the employees whom they send out to labor in hazardous conditions.

Respectfully submitted this 8 day of April, 2021.



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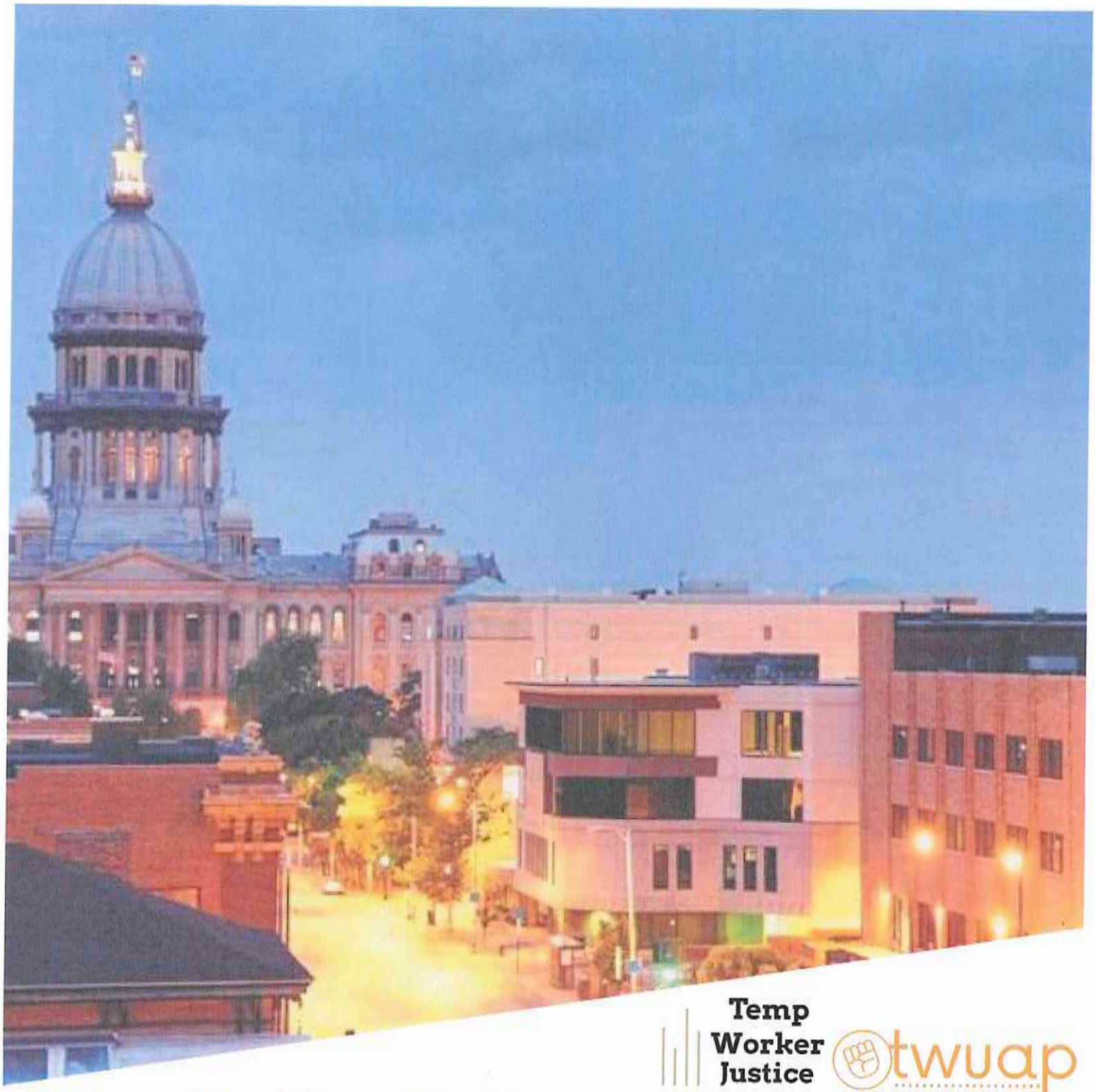
APPENDIX



Temp Worker Justice
RESPONSIBLE JOB GROWTH

twuap

Race, To The Bottom:

TEMP WORKER JUSTICE (TWJ) | TEMP WORKER UNION ALLIANCE PROJECT (TWUAP)

THE DEMOGRAPHICS OF BLUE-COLLAR TEMPORARY STAFFING

DECEMBER 2020 / BY DAVE DeSARIO & JANNELLE WHITE

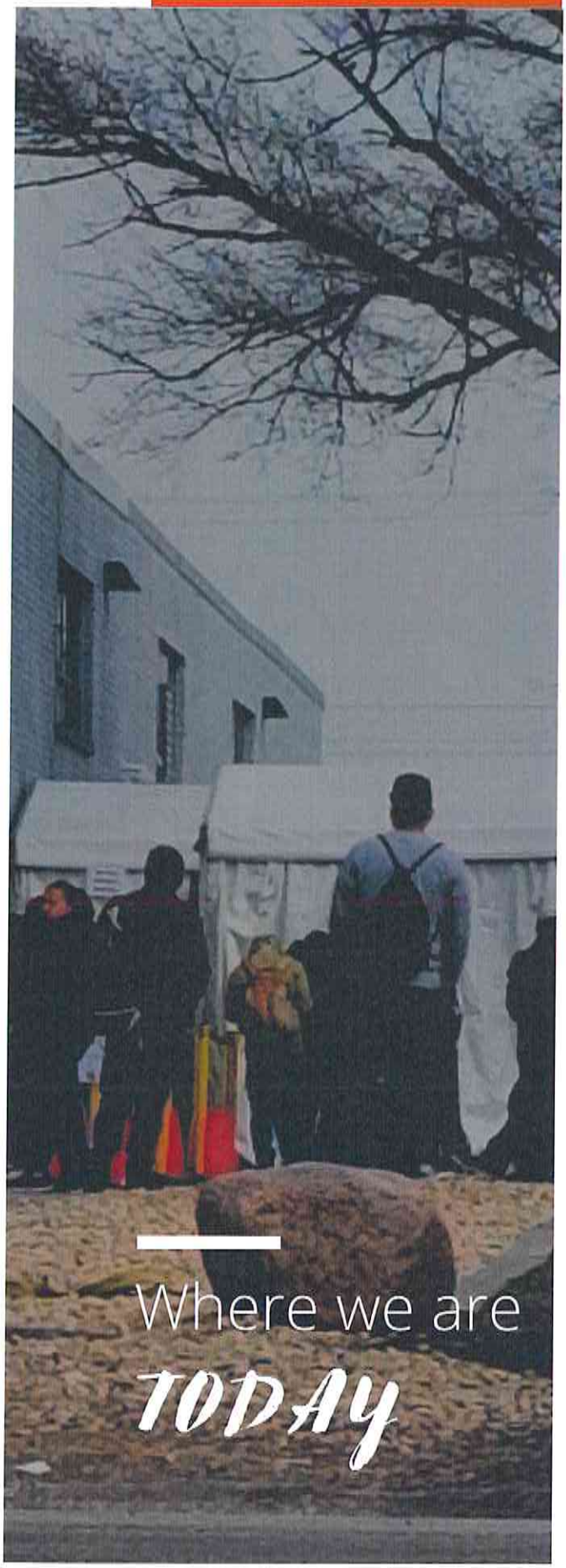
December 2020

RACE, TO THE BOTTOM

Race, to the Bottom (defined): a situation in which temp agencies compete with each other to reduce costs by paying the lowest wages or giving workers the worst conditions based on race

The worst and most dangerous jobs are disproportionately assigned to African-American and Latinx workers, as temporary staffing agencies cut corners and cut costs in a race to the bottom.

An analysis of newly available and unpublished data from the Illinois Department of Labor (IDOL) finds extreme occupational segregation in low-road temp agency jobs, exacerbating racial inequalities, and signaling widespread discrimination in the temporary staffing industry throughout the country. This report from Temp Worker Justice (TWJ) and the Temp Worker Union Alliance Project (TWUAP) raises new questions about flawed data collection methods and inadequate public policies, and proposes solutions to lift African-American and Latinx temp workers up from the bottom.



Temp Worker Justice

RESPONSIBLE JOB GROWTH

Temp Worker Justice (TWJ empowers workers and workers' organizations. Launched in 2019, it is the only national organization dedicated to addressing the issues facing temporary workers. TWJ provides research, education, organizing, and legal support. TWJ builds the capacity for action through partner organizations and workplace leaders, replicating the successes our team and allies have achieved on a local level, bringing them to temporary workers across the country.

twuap

TEMP WORKER UNION ALLIANCE PROJECT

The Temp Worker Union Alliance Project (TWUAP) is comprised of union leaders, worker center leaders, and allies who are deeply concerned about the steep rise of non union temp labor and are working to stop it.

TWUAP aims to strengthen the labor movement by ensuring that temporary workers are no longer used to divide and dilute worker power at job sites, but are instead brought into collective bargaining agreements and grow both worker power and the power of local unions.

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Summary

Most blue-collar temp jobs in the U.S. are staffed by African-American and Latinx workers. This is not a measure of diversity: it's discrimination. There is "diversity" in temp staffing as there is among pay-day loan recipients[1] or in the prison system[2]. **Newly available data shows that the problem is even worse than previously known.**

The Illinois Department of Labor began tracking demographic information of temp agency workers in 2018/2019 as mandated by the Responsible Jobs Creation Act. The data collection methods differ from established U.S. Bureau of Labor Statistics (BLS) practices, capturing a clearer picture of blue-collar temp workers. This first ever analysis of the new data reveals:

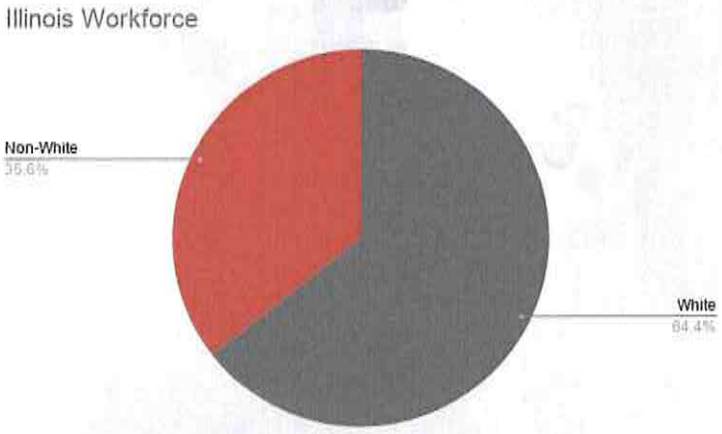
- *85% of blue-collar temp assignments are staffed by non-white workers in a state where non-white workers are just 35% of the workforce (Illinois). 78% of those temp assignments went to African-American and Latinx workers.*
- ***Blue-collar temp workers are nearly 3 times more likely to be African-American and Latinx than the overall workforce.*** *(2.80x for African-American and 2.74x for Latinx - Illinois)*
- *The over-representation of African-American and Latinx workers found in blue-collar temp assignments is more than twice as significant as BLS data has established for the temporary staffing industry .*

Temp jobs perpetuate poverty instead of providing a pathway out of it. They often require the same skills and responsibilities as traditional, direct-hire positions, but offer far less compensation and stability. As companies cut corners and cut costs, it's often temporary staffing agencies that facilitate the race to the bottom. Temp workers receive less training and suffer higher rates of injury. They almost never receive benefits, have unpredictable schedules where assignments can end at any moment, and are treated like second-class citizens in workplaces where legal barriers make unionization almost impossible, and where managers and permanent workers may never bother to learn their names. That is not even to speak of abuses like wage theft, sexual harassment, hidden non-compete agreements that block access to good jobs, and permatemping: where so-called "temps" are on the job for years. In Illinois, the average temp spends six years in "temporary" assignments, and 4 out of 5 never have a temp job turn into a permanent one[3].

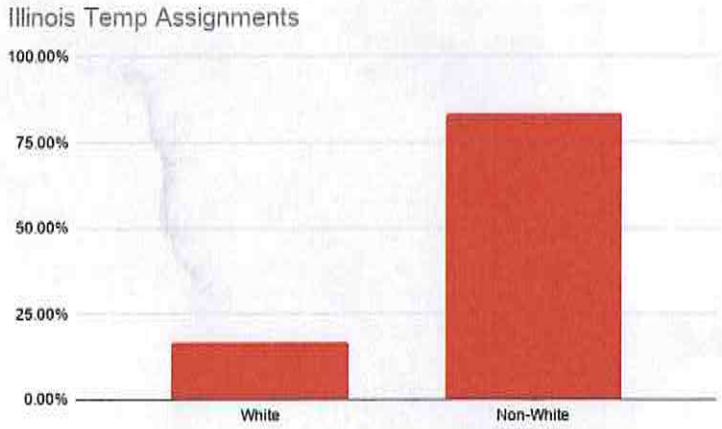
The temp industry may get a worker's foot in the door, but it isn't letting them all the way in, preventing a mostly African-American and Latinx workforce from achieving stable employment, economic security, and equality.

Workforce Demographics

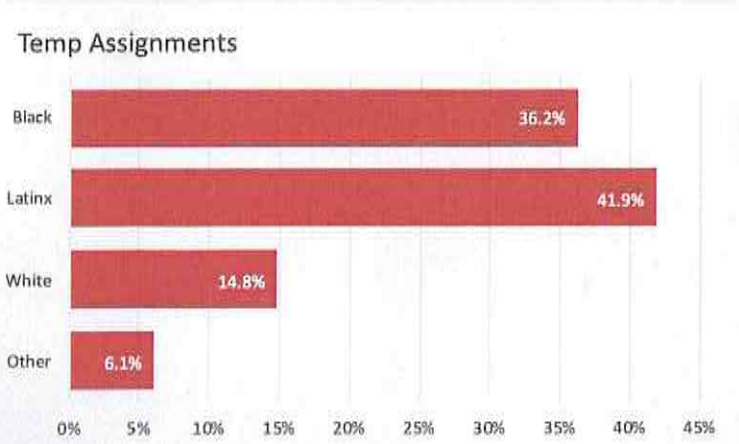
OVERALL IL WORKFORCE:
35.6% NON-WHITE, 64.4% WHITE



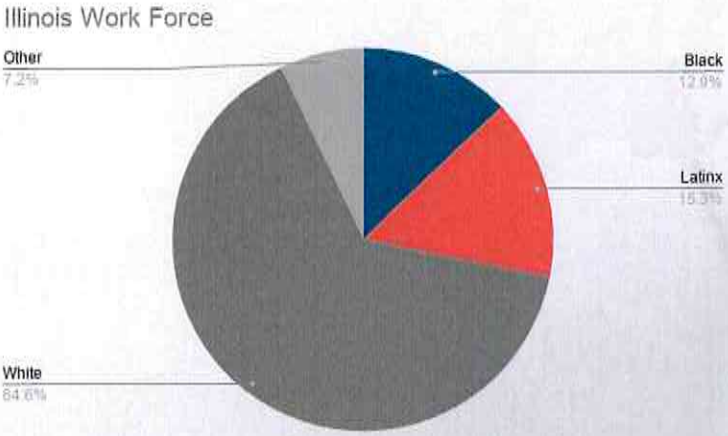
IL TEMP ASSIGNMENTS:
14.8% WHITE, 85.2%NON-WHITE

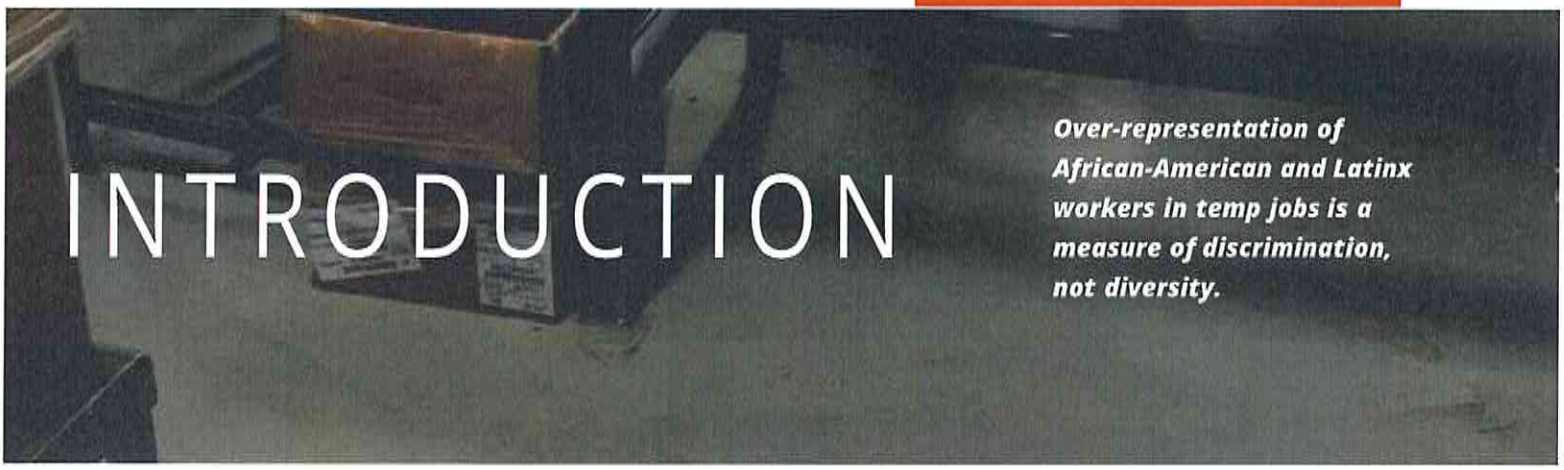


IL TEMP ASSIGNMENTS:
BLACK 36.2%, LATINX 41.9%,
WHITE 14.8%, OTHER 6.1%



OVERALL IL WORKFORCE:
12.9% BLACK, 15.3% LATINX,
64.6% WHITE, 7.2% OTHER





INTRODUCTION

Over-representation of African-American and Latinx workers in temp jobs is a measure of discrimination, not diversity.

Temp agency work has long been associated with an extensive list of negative outcomes for workers. Therefore, any over-representation of African-American and Latinx workers in temp jobs is a measure of discrimination, not diversity.

Employed by temporary staffing agencies, so-called "temp" workers can be in the same position for years, or remain in the industry, shuffled between many different temp assignments for the length of a career. Temporary workers often perform the same work side-by-side with traditional, direct-hire, "permanent" employees. However, temps earn an average of 41% less pay for that same work[4]. Only a small fraction receive benefits of any kind: just 12.8% of temps receive health insurance through their employer, the benefit they are most likely to receive[5]. And, they are twice as likely to be injured on the job while working in higher-hazard blue-collar industries like construction, warehousing, or manufacturing[6].

The U.S. Bureau of Labor Statistics (BLS) has provided the best data on the number of temporary workers in the U.S. and on temporary worker demographics. These figures provide an important baseline, though significant issues with their data and data collection methods will be discussed in this report. According to BLS, there are approximately 3 million temp workers on the job during the average week, and they are much more likely to be Black or Latinx than the overall working population. Nationally, Black workers account for 12.1% of the overall workforce but 25.9% of the temp workforce, an over-representation of 2.14x. Latinx workers make up 16.6% of all workers, but 25.4% of temp workers, an over-representation of 1.53x[7].

Demographic data for Illinois' temporary workforce, according to BLS, is similar to national averages, making data from the state good for a case study. Black workers account for 12.9% of the Illinois workforce but 23.6% of the temp workforce. Latinx workers make up 15.3% of all workers, but 23.0% of temp workers.

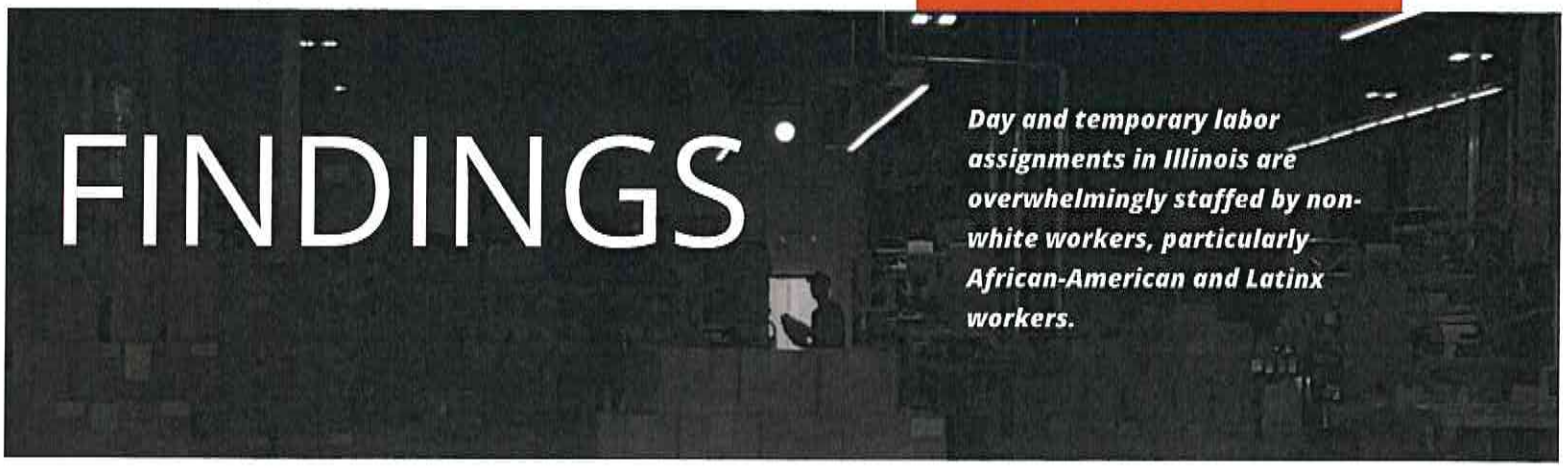
Illinois is also an important state for analysis of the temporary staffing industry because on-the-ground worker organizing and legislation to protect temporary workers are more advanced than in any other state. This is in large part due to the efforts of the Chicago Workers Collaborative (CWC), a workers' center that has been organizing among temporary workers for more than two decades. Researchers are able to gain greater access to temp workers to understand their experiences, can capture a long view of changes in the industry over the last twenty years in which temp workers have been engaged and organized, and the state is the only in the nation to require reporting of any demographic data in the temporary staffing industry. Demographic data is now reported annually to the Illinois Department of Labor (IDOL) using a unique method, giving a clear view that is specific to blue-collar assignments within the temporary staffing industry.

Most large employers with more than 100 employees must report the demographic data of their workforce to the U.S. Equal Employment Opportunity Commission (EEOC) on annual EEO-1 surveys. Large temporary staffing agencies file this survey for their internal staff positions including recruiters, dispatchers, and salespeople. However, these same agencies are exempt from reporting on temp workers, despite their identical legal status to internal employees. This leaves a significant gap in our understanding that Illinois' data collection is, in part, able to remedy.

The Illinois' Day and Temporary Labor Services Act[9] became law in 2000 and has been amended several times since. The most recent addition, the Responsible Jobs Creation Act, was passed in 2017, adding an annual record-keeping and reporting requirement for temporary staffing agencies effective in 2018. It is the first and only law in the country that begins to hold temporary staffing agencies accountable for the occupational segregation and discrimination reported by many workers, and shown in BLS data as an extreme over-representation of Black and Latinx workers.

The Illinois law requires day and temp labor services agencies to submit annually to the Illinois Department of Labor (IDOL) "the race and gender of each day or temporary laborer sent by the day and temporary labor service agency, as provided by the day or temporary laborer." The data are available to the public on the county level, with privacy protections given to individual agencies. Furthermore, the law limits reporting to "day and temporary laborers," generally interpreted to mean "blue-collar workers," and thus excluding significant portions of temps in healthcare, information technology, and other higher-income fields. This Illinois-specific definition of "temporary laborer" may miss as much as 60% of the state's temp agency workforce[8], but what it does provide is a unique and valuable view of industrial temp staffing.

This demographic information for the state of Illinois first became available following the first full year of reporting in 2019, and was obtained by Temp Worker Justice via FOIA request in May 2020.



FINDINGS

Day and temporary labor assignments in Illinois are overwhelmingly staffed by non-white workers, particularly African-American and Latinx workers.

Table 1.1
Illinois Department of Labor (IDOL), 2019 Temporary Day and Temp Labor Assignments Demographic Data

	Black	Latinx	White	Two or More Races	Asian	Native American	Pacific Islander
Total	247571	286172	101399	20555	10820	11099	5776
%	36.2%	41.9%	14.8%	3.0%	1.6%	1.6%	0.8%

Day and temporary labor assignments in Illinois are overwhelmingly staffed by non-white workers[10], particularly Black and Latinx workers, according to the Illinois Department of Labor (IDOL) (Appendix, Table 1.1). Men are more likely to work temp assignments than women, though Latinx women have the higher rates of participation than Black or white women in temporary jobs compared to men of the same race (Appendix, Table 1.2, 1.3). The IDOL data shows an even higher degree of discrimination and occupational segregation than data from the U.S. Bureau of Labor Statistics (BLS).

According to IDOL, day and temporary work assignments in Illinois go to Black residents at a rate 2.71x greater than the overall population of Illinois. Latinx workers are overrepresented at a rate 2.18x greater than the state's population (Appendix, Table 2).

Labor participation rates in Illinois vary significantly by race (56.8% for Black workers, 65.7 for white workers, and 70.5% for Latinx workers)[11]. This variation is more pronounced in Illinois than national averages. Therefore, when comparing labor participation rates and IDOL data on temporary worker demographics, the disproportionate assignment of temp staffing jobs for Black and Latinx workers is even greater (Appendix, Table 3). Within Illinois' workforce, IDOL finds Black workers are 2.81x more likely to work temp assignments, and Latinx workers are 2.74x more likely.

The over-representation for Black and Latinx workers in Illinois is mirrored by under-representation of white workers. Whites are a majority in both the state population (60.8%) and the state's workforce (64.6%). However, IDOL finds that white workers in Illinois are only placed in 14.8% of day and temporary labor assignments, an under-representation compared to labor participation rates by 4.36x.

Black and Latinx workers are also significantly over-represented in BLS data on temporary workers in Illinois (Appendix, Table 4.1). While IDOL reaches the same conclusion, it shows it to a far greater degree, warranting additional analysis (Appendix, Table 4.2).

In Illinois there is a gender gap in labor participation, with women trailing men by 11.2%[12]. In temp staffing, that gap is 15.4% in the state (Appendix, Table 5). This gender disparity was most pronounced for white and black workers, and less significant or reversed for other groups in the temp workforce (Appendix, Table 1.2, 1.3).

DISCREPENCIES: IDOL & BLS DATA

There is a greater degree of occupational segregation and discrimination in temporary staffing than we knew, and we need better data collection methods to know the scope and magnitude.

The Illinois Department of Labor (IDOL) data analyzed in this report show a much greater degree of occupational segregation and discrimination than previously known through Bureau of Labor Statistics (BLS) data. This should add urgency to the effort to create a better understanding of discrimination in temp staffing, and to improve working conditions for temporary workers.

Table 4.2
BLS, 2019: Illinois NAICS (5613) Employment Services Demographic Data
IDOL, 2019: Illinois Temporary Laborer Demographic Data

	Black	Latinx	White
BLS	23.6%	23.0%	46.1%
IDOL	36.2%	41.9%	14.8%

The difference in temp worker demographic data produced by IDOL and BLS needs further exploration to understand fully why variation exists, and to create a new, more accurate measurement. The discrepancies are in large part due to differences in the definitions of "temporary agencies" and "temporary workers," and in the timing of data collection. This in itself is revealing, but it does not provide a complete answer.

BLS uses the North American Industry Classification System (NAICS) code for "employment services" including "temporary help services" to establish the temporary staffing industry for the purposes of their analysis. The NAICS code is self-reported by businesses based on their principal product or service. So, businesses that engage in more than one activity, of which temporary staffing is included, are not having their temporary workers counted by BLS if temporary staffing is not how they define their principal product or service. For example, a 2002 study found temporary staffing agencies reporting under at least 20 different NAICS codes[13]. For those agencies that identify as "employment services," all employees are included in the data collected, which means that internal agency staff, such as recruiters, salespeople, and executives, are counted along with temporary workers. This pollutes the pool of temporary workers. In addition, BLS data examines the workforce population at one limited point in time. So, it cannot capture the frequency of turnover in temporary staffing throughout a year. This one-off collection period can help capture the occupational segregation that exists in temporary staffing, but not discrimination in job quality as correlated to the frequency of different job placements, an indicator of poor job quality and insecurity.

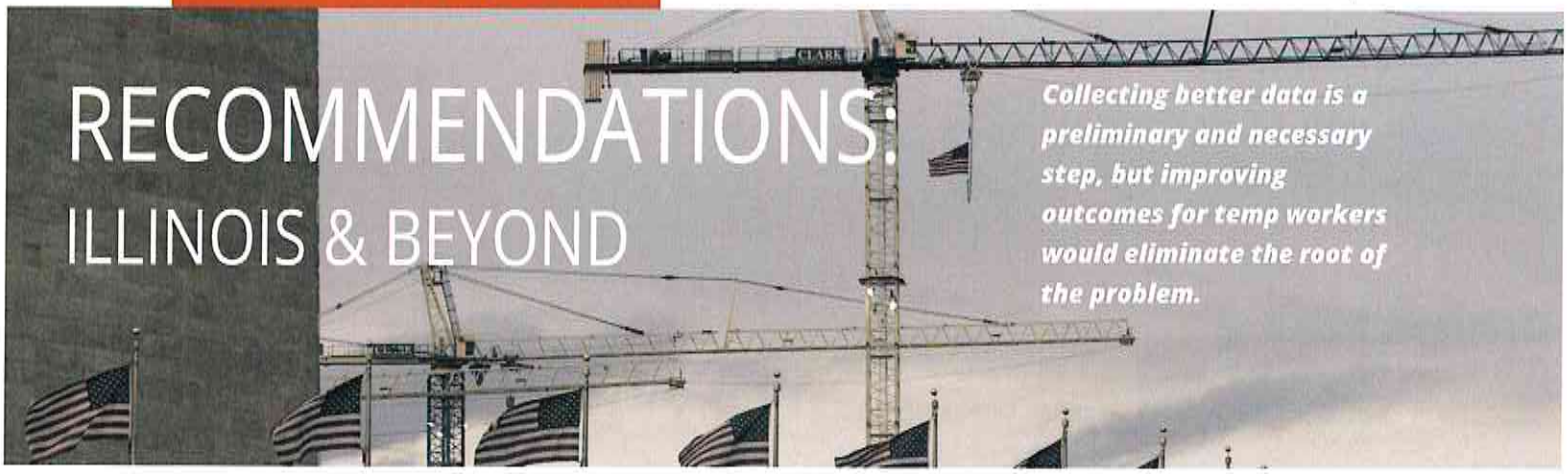
IDOL requires reporting by "any person or entity" placing day and temporary laborers, regardless if that is the self-described principal service. This eliminates the BLS issues of variable NAICS codes. But, IDOL uses a more limited interpretation of "temporary workers," defined as only "day and temporary laborers." This essentially confines the data collection to only blue-collar work. This fails to track the full range of industries in which temporary workers are placed, but it does create a unique and clearer view of industrial temp assignments.

On data collection timing, the IDOL data are measured "whenever" a worker is sent on an assignment during the course of a year, so the same individual may be counted more than once. A single worker may be sent on many assignments by an agency, or work for several different agencies during the course of the annual reporting period. This method can roughly capture the quality of job assignments received by workers: the more frequent assignment on many shorter, less stable jobs is a negative outcome, and can be seen as an indication of discrimination if applied disproportionately to a group. But, this measure is only useful in context when it is compared to a count like BLS that defines the population at a set time.

It is clear that flaws exists in the BLS and IDOL methods to measure temporary staffing industry demographics. But, there are two ways to understand the discrepancy between IDOL and BLS data:

A) IDOL and BLS demographic data are different because they define the temporary staffing industry differently. IDOL is measuring blue-collar "day and temporary laborers" exclusively, while BLS is measuring a full range of occupations in temp staffing. If this is the only reason for the differences in demographic data, then white-collar temp jobs must be vastly over-staffed by white workers in Illinois, with almost no Black or Latinx workers. This would indicate an additional layer of occupational segregation and discrimination: blue-collar temps vs. white-collar temps in addition to the known differences between temp vs. perm workers.
B) IDOL and BLS data are different because they count workers differently. IDOL counts demographic information for each assignment during a year, whereas BLS counts during a brief moment in time. Temp positions may turnover many times during the course of a year, so a single individual may be counted many times by IDOL, but just once by BLS. If this is the only reason for the discrepancy, then IDOL's higher rate of participation by Black and Latinx workers is capturing discrimination in job placements: Black workers in particular may be given less stable or shorter assignments, are laid off more often, or are converted to permanent positions less frequently than white temp workers, thus starting new assignments more often and being counted more often.

Either or both of these reasons can lead one to the same conclusion: there is a greater degree of occupational segregation and discrimination in temporary staffing than we knew from BLS data, and we need better data collection methods to know the scope and magnitude.



RECOMMENDATIONS: ILLINOIS & BEYOND

Collecting better data is a preliminary and necessary step, but improving outcomes for temp workers would eliminate the root of the problem.

This new Illinois Department of Labor (IDOL) data adds to evidence of extreme occupational segregation and discrimination in temporary staffing. It makes clear two urgent needs for Illinois and beyond: 1) the need to improve data collection methods to fully understand the extent of this issue, and to track changes over time, and 2) the need to improve the quality of temporary jobs and outcomes for temp workers now, as we move to eliminate discrimination and occupational segregation in the industry over time.

In Illinois, data collection can be improved by amending the Day and Temporary Labor Services Act, adding to the existing framework and reporting requirements.

1) Require temporary staffing agencies to report the demographic information of all job applicants, not just of those hired. This will help monitor discrimination in hiring.

2) Require agencies to provide additional details about each job assignment including total hours worked, hourly pay rate, if the assignment ended with a conversion to a permanent position, if workers received health insurance, the industry in which work is performed, and the name of the worksite employer. This will monitor discrimination in the quality of job assignments and direct-hiring. It can also show whether any over-representation by race or gender is a reflection of the occupational segregation that may exist separately within industries, or if there is additional occupational segregation or discrimination by staffing agencies and specific worksite employers.

3) Value accountability over privacy by monitoring the demographics of each day and temporary labor services agency, making those agency names and demographic data available to government regulators and the public. Currently, IDOL data is aggregated and only available on a "municipal and county basis." This will identify the worst actors, distinguish better ones, and encourage enforcement where necessary.

4) Expand the definition of "day and temporary agency" and "day or temporary laborer" under the IL law to capture the full temporary staffing industry, inclusive of its large presence in healthcare, information technology, and office work, among other industries. This will demonstrate if temp workers in higher-wage fields are also experiencing discrimination in hiring or placement.

Nationally, data collection can be improved by using existing systems, or new legislation could be passed.

1) The U.S. Equal Employment Opportunity Commission (EEOC) can require temporary staffing agencies to track demographic data of temporary workers through the existing EEO-3 survey. This survey is currently used for unions, detailing demographic information of individuals employed, those who are applying, and for the number of job referrals. This will capture data on discrimination and job quality where it is missing on the more common EEO-1 surveys that are designed for workforces with more standard employment arrangements.

2) The Restoring Worker Power Act of 2020, H.R. 7638, would require reporting of demographic data on all temporary workers and applicants for temporary jobs, among many other reforms[14].

Collecting better data is a preliminary and necessary step, but improving outcomes for temp workers would eliminate the root of the problem. An over-representation by Black and Latinx workers in temp staffing would not be an issue if temp jobs provided a fair wage, safe working conditions, and a real path to a permanent job. The factors that make temp work bad can be abated or eliminated through increased enforcement of existing laws, high-road employer practices, or legislation (not to mention worker organizing).

1) Enactment of the Temp Agency Seal of Approval Program in Illinois and beyond would improve enforcement. The Citizens' Task Force to Improve Enforcement of Temp Worker Rights in Illinois has been bringing together public officials, labor unions, workers' centers, academic experts, and legal and workforce development professionals since December 2018 to identify effective, innovative enforcement models and create a new program that adapts these models to the task of bringing temp agencies into compliance with Illinois law. The emerging proposed program seeks to create market incentives for temp agency compliance with basic labor laws and an independent monitoring and complaints program grounded in community partnerships that can reliably verify compliance. In addition to requiring temp agencies that join the program to abide by Illinois' existing laws, the Seal of Approval addresses discrimination in hiring by requiring them to provide demographic information on their applicants as well as employees.

2) Implementation of conscientious worksite employer practices like the High-Road Staffing Contract would improve job quality in workplaces that use temporary staffing agencies. This model contract for worksite employers and staffing agencies raises standards within individual organizations and provides: A) A clear path to permanent employment to reduce permatemping, B) Greater occupational safety protections to minimize workplace injuries, C) Clear procedures for reporting and handling of claims of sexual harassment and discrimination. The High-Road Staffing Contract staffing service agreement was developed by Temp Worker Justice, with input from alternative and non-profit staffing agencies to ensure that the terms and financial considerations would fit the industry's business model.

3) Expand legislation in Illinois and in other states, or pass a federal law like the Restoring Worker Power Act of 2020, H.R. 7538, to raise standards, expand rights, improve enforcement, and increase job quality. Legislation could include provisions that provide: A) Equal pay for equal work, removing the wage penalty in this majority-minority workforce, B) Equal safety training for temp and permanent employees, reducing the higher burden of workplace injury on temp workers, C) Transparency so temp workers know, in advance of arriving at a worksite, the terms of their employment including pay rate, expected duration of assignment, and if there are any required certifications to safely perform the work, D) Limitations on the "conversion fees" that agencies charge worksite employers to convert temp workers to permanent employees, reducing barriers to good jobs, E) Priority hiring of temp workers for open positions at worksite employers, giving temps an advantage over workers with less on-site experience, F) Eliminating non-compete clauses for temp workers, allowing them to freely seek better employment, and G) Enforcement mechanisms that make it possible for temp workers to exercise their rights without fear of retaliation, holding agencies accountable when laws have been violated.

CONCLUSION

There can no longer be any delay to our collective action.

The data collected by the Illinois Department of Labor (IDOL) is an important new piece of evidence. But, the findings of this report are no surprise to many temporary workers and those who have spent time organizing temp-ed out workplaces. For them, discrimination is often clear and layered throughout the work experience in temporary staffing: from the advertising of temporary assignments, to the hiring by temp agencies, to the quality of job placements, to the consistency of work, to treatment at the workplace by supervisors, to the division of people within workplaces, to the conversions from temp worker to permanent employee.

Temporary staffing agencies cannot create these negative outcomes on their own. They require clients, the worksite employers of temps, to ignore or facilitate discrimination and abuse. They require policymakers to take a pass on regulating the industry, unlike nearly every other industrialized and semi-industrialized nation on earth. They need organized labor to remain generally passive as the temp industry continues to erode and degrade jobs that were once good, and often union. A strong effort by any one of these groups could end discrimination in temp staffing, and ensure that temp jobs provide fair pay, safe workplaces, and a real path to stable, permanent work.

The new data made available by IDOL and analyzed in this report should add to the urgency for action. If low-road temp assignments took advantage of specific demographic groups 2% more often than the overall working population, it might not be cause enough to act. If it was 10% more often, there might be better ways to address racial and economic inequality than reforming the temporary staffing industry. But, when we find that African-American and Latinx workers are nearly 3 times more likely to work in a system that is preventing them from achieving economic equality, and putting that at significantly greater risk of injury, there can no longer be any delay to our collective action.

APPENDIX

Table 1.1
Illinois Department of Labor (IDOL), 2019
Day and Temp Labor Assignments Demographic Data

	Black	Latinx	White	Two or More Races	Asian	Native American	Pacific Islander
Total	247571	286172	101399	20555	10820	11099	5776
%	36.2%	41.9%	14.8%	3.0%	1.6%	1.6%	0.8%

Table 1.2
Illinois Department of Labor (IDOL), 2019
Men: Day and Temp Labor Assignments Demographic Data

	Black	Latinx	White	Two or More Races	Asian	Native American	Pacific Islander
Total	155936	150159	62148	11887	6158	5329	2943
%	39.5%	38.1%	15.8%	3.0%	1.6%	1.4%	0.7%

Table 1.3
Illinois Department of Labor (IDOL), 2019
Women: Day and Temp Labor Assignments Demographic Data

	Black	Latinx	White	Two or More Races	Asian	Native American	Pacific Islander
Total	91635	136013	39251	8668	4662	5770	2833
%	31.7%	47.1%	13.6%	3.0%	1.6%	2.0%	1.0%

Table 2
U.S. Census Bureau, 2019
Illinois Population Demographics

Black	Latinx	White	Two or More	Asian	Native American	Pacific Islander
14.6%	17.5%	60.8%	2.1%	5.9%	0.6%	0.1%

Table 3
U.S. Bureau of Labor Statistics (BLS), 2019
Illinois Workforce Demographics

	Black	Latinx	White	Asian or Pacific Islander	Other
Total	758737	898661	3800403	354600	73893
%	12.9%	15.3%	64.6%	6.0%	1.3%

Table 4.1
U.S. Bureau of Labor Statistics (BLS), 2019
Illinois NAICS (5613) Employment Services Demographic Data

	Black	Latinx	White	Asian or Pacific Islander	Other	Other
Total	50021	48768	97674	12384	14885	14885
%	23.6%	23.0%	46.1%	5.8%	7.0%	7.0%

Table 4.2
BLS, 2019: Illinois NAICS (5613) Employment Services Demographic Data IDOL, 2019: Illinois Day and Temp Labor Assignments Demographic Data

	Black	Latinx	White
BLS	23.6%	23.0%	46.1%
IDOL	36.2%	41.9%	14.8%

Table 5
Illinois Department of Labor (IDOL), 2019
Illinois Day and Temp Labor Assignments Demographic Data

	Male	Female
Total	394560	288832
%	57.7%	42.3%

REFERENCES & NOTES

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SHARP
Safety & Health Assessment & Research for Prevention

Research Findings

Temporary Workers at Risk

Factors Underlying Observed Injury Rate Differences between Temporary Workers and Permanent Peers

American Journal of Industrial Medicine, 2017

Michael Foley

Overview

Temporary work and other forms of non-standard work arrangements account for a growing share of jobs in the US economy. Temporary work has spread beyond its traditional base in the office and clerical sectors into higher hazard industries such as manufacturing and construction.

This study used Washington State workers' compensation claim data from 2011 to 2015. Time-loss claim rates for temporary workers were compared to those of workers in standard employment in similar occupations.

Interviews with injured temporary workers and permanent peer-workers, matched by industry, tenure, age, and gender, were conducted to explore the association of several potential risk factors with temporary employment. Interviews also characterized countermeasures such as pre-employment experience screening, general and specific safety training, supervision and task control.

Key Findings

- Temporary workers experience about twice the rate of time-loss claims per 100 full-time equivalent (FTE) workers compared to their permanent peer-workers.
  - The gap in claim rate between temporary workers and permanent peers is greater in high hazard sectors such as agriculture, manufacturing, and construction.
  - Analysis by work-related musculoskeletal disorders (WMSD) and non-WMSDs indicated temporary workers had higher claim rates than their peers for both categories.
- Temporary workers reported similar or lower exposures as their permanent peer- workers to a range injury hazards.
  - Exposure to musculoskeletal hazards was the highest risk faced, followed by machinery and falls.
  - Exposure to fall hazards was significantly lower for temporary workers than for permanent workers.
- Temporary workers reported being less prepared to protect themselves from hazards by such measures as experience screening, training, and task control.

Impact

This study adds to the evidence that policies are needed to improve screening and training of temporary workers, discourage job-switching, improve workers' hazard awareness and protect workers' right to refuse unsafe conditions. The responsibilities of agencies and host employers for ensuring the safety of their temporary workers need clarification.

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Find the article here:
http://onlinelibrary.wiley.com/doi/10.1002/ajim.22763/full

Funding for this project was provided in part by a grant from the National Institute for Occupational Safety and Health (NIOSH).

Research for Safe Work

The SHARP Program at the Washington State Department of Labor & Industries partners with business and labor to develop sensible, effective solutions to identify and eliminate industry-wide hazards. Learn more at www.lni.wa.gov/Safety/Research/

75-27-2017
FY14-456 [05-2014]

Washington State Department of Labor & Industries

CERTIFICATE OF SERVICE

Pursuant to RAP 18.5, I hereby certify that I filed the Brief of Amici Curiae with the Clerk of the Court via e-filing through the Washington State Appellate Courts Portal, with service to the below persons performed automatically via email by the Court's web portal at the time of filing, on April 8, 2021.

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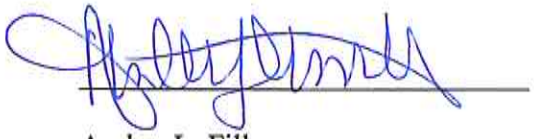

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